Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-365

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

LASALLE NATIONAL BANK, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTION PRESENTED.

Whether the Internal Revenue Service properly may issue a summons solely in aid of a criminal investigation.

STATEMENT OF THE CASE.

On August 15, 1975, two summonses from the Internal Revenue Service were served upon the Respondents. The summonses were directed to the LaSalle National Bank as trustee under two Illinois land trusts and required the Respondents to appear and give testimony as well as produce records with respect to these land trusts.[1]

1. An Illinois land trust is a contract by which a trustee is vested with both legal and equitable title to real property and the interest

(Footnote continued on next page)

The Respondents appeared in response to the summonses, but, on advice of counsel, did not produce the land trust records or give testimony.

On November 19, 1975, the Petitioners herein filed a petition seeking judicial enforcement of the summonses. On that date the District Court for the Northern District of Illinois entered an Ex Parte Order requiring the Respondents to appear on December 5, 1975, and to show cause why they should not be compelled to obey the two Internal Revenue Service summonses served upon them on August 15, 1975.

Pursuant to the Order, the Respondents appeared on December 5, 1975, at a hearing held by the district court to determine the enforceability of the two Internal Revenue Service summonses. Special Agent John F. Olivero was the sole witness on behalf of Petitioners and his investigative file was examined by the district court *in camera.*

On March 9, 1976, the district court entered its Order and Memorandum Opinion denying judicial enforcement of the two Internal Revenue Service summonses, stating in its opinion that "[i]t is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso." (App. A, p. 3a)

On May 7, 1976, the Petitioners herein filed their Notice of Appeal. The cause was briefed and set for argument before

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(Footnote continued from preceding page.)
of the beneficiary is considered personal property. Under this trust the beneficiary or any person designated in writing by the beneficiary has the exclusive power to direct or control the trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive right to the earnings, avails and proceeds of said property. Ill. Rev. Stat. ch. 29, § 8.31 (1971).

the United States Court of Appeals for the Seventh Circuit, which issued its opinion on April 11, 1977.

The court of appeals defined its undertaking in terms of two questions. The first issue concerned the court's scope of review, while the second issue was characterized by the court as "whether the district court applied the proper legal test in making its finding of fact." (App. B, p. 9a)

It is apparent from a reading of the opinion below that the court of appeals dealt unequivocally with the second question resolving it in favor of the Respondents:

> We agree with the respondents that the petitioners arguments ignore the good faith requirement of *Donaldson.* We further agree that the real issue before the court is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunciated in *Donaldson.* (App. B, p. 4a)

Relying on *Donaldson* v. *United States,* 400 U. S. 519, and the standard for enforcing an Internal Revenue Service summons provided therein, the court of appeals stated:

> We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him. (App. B, p. 15a)

Finally, the court of appeals found no misapplication of the standards set forth in *Donaldson*:

> We note that the district court expressly observed that the *bona fides* of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson, see* 400 U.S. at 536, we read the statement as a faithful reflection of that decision's alternative holding. (App. B, p. 15a)

In June, 1977, the Petitioners herein requested from this Court an extension of time from July 10, 1977, to and including September 8, 1977, within which to file a petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The motion of the Petitioners was granted, and on or about September 8, 1977, the Petitioners herein filed their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Respondents herein requested an additional thirty days within which to file a response to the Petition for a Writ of Certiorari and were granted an extension of time to and including November 7, 1977.

REASONS FOR DENYING THE PETITION.

1. a. The Petitioners herein characterize the question presented to the court as "Whether an internal revenue summons may properly be issued to obtain third party records in aid of an administrative investigation conducted by the Internal Revenue Service to determine whether it should recommend to the Department of Justice that a taxpayer be prosecuted for criminal tax violations." (Pet. p. 2)[2]

Although the Petitioners may have an interest in resolving the question posed in their Petition, that question bears no relation to the issue that would be before this Court if the Petition herein were granted. It is abundantly clear from the opinion of both the district court and the court of appeals that the issue litigated and decided below was whether the Internal Revenue Service may issue a summons in an investigation solely for criminal purposes.

The difference between the foregoing and the question posed by the Petitioners is more than semantic. The question of whether the summonses herein properly were denied enforcement must be decided not only with reference to *Donaldson*, but also with

2. "Pet." refers to the Petition filed herein.

reference to the broader issue of the government's administrative subpoena power. As this Court stated per Justice Frankfurter in *Abel* v. *United States*, 362 U. S. 217,

> The deliberate use by the government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States. (362 U. S. at 226)

The distinction between the issues herein and the issues facing the Court in *Donaldson* is significant, although the standard in *Donaldson*, based on the Court's opinion in *Reisman* v. *Caplin*, 375 U. S. 440, has been applied correctly in the instant proceeding.

In *Donaldson* the taxpayer urged that an internal revenue summons could not be utilized in aid of an investigation that had the potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer.

The facts of the instant case and the findings from which the Petitioners wish to appeal simply are not analogous. Here the Respondents argued that the summonses were issued solely in aid of a criminal investigation. The legal basis upon which the Respondents relied is twofold: (1) that an Internal Revenue Service summons may not be issued solely in aid of a criminal investigation, and (2) that the administrative subpoena power of the Internal Revenue Service is limited constitutionally.

The district court below found that the special agent "was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso." (App. A, p. 3a) Citing both *Donaldson* and *Reisman*, the Court denied enforcement of the summonses.

The United States Court of Appeals for the Seventh Circuit found no difficulty in sustaining the factual findings of the district court.

> Assuming arguendo that the Supreme Court has not overruled or qualified *Donaldson* in its more recent adjudications, there is ample support in the record for the district court's finding of sole criminal purpose. The record establishes that Olivero testified to the existence of a civil purpose but that the district court, who observed the demeanor of the witnesses, discredited that testimony. We are not left with a firm and definite conviction that [a] mistake has been made. (App. B, p. 9a)

Further, the Court stated:

> Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson, see* 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding. (App. B, p. 15a)

Neither the district court nor the court of appeals dealt directly with Petitioners' argument as to the constitutional limitations of the Internal Revenue Service's administrative summons power. However, their agreement in finding, first, that the summonses were issued solely in aid of a criminal investigation and second, that summonses so issued could not meet the good faith standard articulated in *Donaldson*, precluded the necessity for either court to consider these constitutional limitations.

The statutory power of the Internal Revenue Service to issue summonses is not limited by the standards and requirements surrounding the issuance of a warrant of search and seizure. If the Internal Revenue Service may issue a summons solely in aid of a criminal investigation, the protections afforded by the Fourth and Fifth Amendments to the Constitution of the United States of America are rendered meaningless. The Petitioners already have suggested that the Fourth and Fifth Amendments can be ignored prior to a recommendation for criminal prosecution. However, the instant proceeding need not be decided on this Constitutional ground should the Court follow its prior decisions in *Donaldson* and *Reisman* that a summons cannot be issued solely in aid of a criminal investigation.

b. Petitioners' advocacy of their position has resulted in more than mere misstatement of the issue before the Court. The Petition filed herein offers misquotations from the *Donaldson* decision as support for the position taken by the Petitioners.

The first sentence of the Petitioners' argument contains the following quotation, purportedly from *Donaldson*, 400 U. S. at 536: "under § 7602 [of the Internal Revenue Code] an internal revenue summons may be issued in good faith and prior to a recommendation for criminal prosecution." (Pet. p. 6) The correct quotation itself differs markedly from that submitted by the Petitioners:

> We hold that under § 7602 an internal revenue summons may be issued *in aid of an investigation if it is issued* in good faith and prior to a recommendation for criminal prosecution. (*id.* at 536) (Emphasis added.)

In their zeal, the Petitioners not only omitted words crucial to the context and meaning of the quoted lagnuage, but supplied parentheticals where none in fact existed.

The Petitioners' misuse of quotations is not confined to the above instance. In the second paragraph of the argument, the Petitioners, once again purporting to quote *Donaldson*, state:

> Despite the Court's unequivocal ruling in *Donaldson* that an internal revenue summons "may be issued in good faith and prior to an recommendation for criminal prosecution," the court of appeals held that a special agent may not issue a summons for third party records in aid of a criminal investigation even though there has been no recommendation for prosecution. (Pet. p. 6)

The unequivocal ruling followed by the court of appeals was not that which was attributed to it by the Petitioners, but rather: "we hold that under § 7602 an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." (*id.* at 536)

There is a distinct difference between the statement that an Internal Revenue summons may be issued in good faith and

prior to a recommendation for criminal prosecution and the statement that "an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." (*id.* at 536.)

c. The Petitioners herein refer the Court to *United States* v. *Troupe*, 438 F. 2d 117 (C. A. 8) and contend that it conflicts with the decision below. A reading of *Troupe*, however, demonstrates that the decisions are in agreement. The court in *Troupe* states:

> The primary argument presented on appeal is that the district court erred in its interpretation of Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964), in requiring a showing that the *sole* purpose of investigation be criminal in nature before a challenge to the summons can be made. (438 F. 2d at 119) (Emphasis in original)

The issue in *Troupe*, as in *Donaldson*, was whether the enforcement of an Internal Revenue Service summons could be denied on the grounds that one of the purposes for which it was issued was to investigate what might prove to be criminal conduct. It is sheer sophistry to allege a conflict between the decision below and the decision in *Troupe*. In the instant action, the court below found that the summons had been issued solely in aid of a criminal investigation. In *Troupe*, the court found that the investigation therein could not be so characterized and, citing this Court's opinion in *Donaldson*, stated:

> Thus, it is only when the *sole* purpose of the summons is for a criminal investigation that a challenge to the summons can be made. (*id.* at 119)

d. The Petitioners assert:

> Moreover, the courts of appeals are in disagreement over when Donaldson prohibits use of an Internal Revenue summons in connection with a possible criminal case. (Pet. p. 7)

Not only is the statement that the courts of appeals are in disagreement incorrect, but the focus of Petitioners' assertion

avoids the issue that is before the Court. The question is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and not when *Donaldson* prohibits the use of a summons in connection with a possible criminal case. The Respondents did not contend below, and do not argue now, that the Internal Revenue Service is prohibited by *Donaldson* or any other case from issuing a summons in aid of an investigation where "the potentiality of an ultimate recommendation for prosecution" exists. 400 U. S. at 536.

The legitimacy of a summons which may issue in aid of a joint investigation or in an investigation in which there is a potential for recommendation for prosecution is not in issue. At issue is the right of the Petitioners to issue a summons solely in aid of a criminal investigation. The courts of appeals have not been in disagreement regarding the application of either *Donaldson* or *Reisman* to this question.

The Petition filed herein cites the Court to *United States* v. *Weingarden*, 473 F. 2d 454 (C. A. 6), indicating that the court rejected the government's assertion that a summons is enforceable so long as it is issued prior to a recommendation for prosecution.

This reference to *Weingarden* gives the mistaken impression that the Petitioners were not the prevailing party therein. In *Weingarden* the Petitioners had appealed from a finding by the district court that the summons involved therein had been issued solely in aid of a criminal prosecution. On appeal, the court reversed, stating:

> Considering all of the evidence, together with the inferences to be drawn therefrom, we are of the opinion that one of the purposes of the investigation and audit was to determine civil tax liability and possible fraud penalties. (473 F. 2d at 461)

The *dicta* to which the Petitioners seem to take exception was the rejection by the court of the government's analysis

that a summons even if issued solely in aid of a criminal investigation, is enforceable under *Donaldson* if it is issued prior to a recommendation for prosecution.

The applicable holding in *Donaldson* upon which the Petitioners relied in *Weingarden* read:

> We hold that under Section 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. (*id.* at 536)

The *dicta* in *Weingarden* does not indicate what the Petitioners' position was with respect to the requirement of good faith. The court found it sufficient to state that the district court applied the correct standard when it denied enforcement of the summons on the basis that the sole purpose for its issuance was to gather information in aid of a criminal prosecution.

The question of good faith, however, was central to the courts analysis in *Weingarden*. Reversing the decision below, the court concluded that, although a summons issued solely in aid of a criminal investigation cannot meet the "good faith" standard of *Donaldson*, the finding that the summons had been issued for such a purpose was erroneous.

The Petitioners also refer the court to footnote 11 in the *Weingarden* decision, where the court indicated that the position advanced by the government in the *Weingarden* case apparently was accepted by the Eighth Circuit in *Troupe*. As the Respondents have indicated above, the *Troupe* decision was in accord not only with *Weingarden* but with the instant action as well.

> Thus, it is only when the *sole* purpose of the summons is for a criminal investigation that the challenge to the summons can be made. (438 F. 2d at 119)

The Petitioners cite the court to *United States* v. *Wall Corp.*, 475 F. 2d 893 (C. A. D. C.), indicating that the court premised enforceability of the summons upon the subjective motivation

of the agent. Again, the impression given that the Petitioners had not been the prevailing party is mistaken. The court, in a *per curiam* affirmance of the decision below enforced the summons.

The *dicta* in *Wall* neither "carried the 'sole criminal purpose' test one step further" nor premised the enforceability of the summons upon the subjective motivation of the agent (Pet. p. 8). The court in *Wall* merely analyzed the good faith standard in *Donaldson*, which was neither necessary nor appropriate in the *Weingarden* case. In *Wall* the court stated:

> Our inquiry is not ended upon a determination that prosecution has neither been instigated nor recommended, since *Donaldson* also requires that a summons be issued 'in good faith.' This, if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. (475 F. 2d at 895)

The Petitioners then seek to contrast the holdings in both *Wall* and *Weingarden*, as well as the holding below with the holding in *United States* v. *Hodge and Zweig*, 548 F. 2d 1347 (C. A. 9). Here the Petitioners assert that the Ninth Circuit retreated from what they characterize as the firm purpose test and upheld the enforcement of a summons despite a recommendation for prosecution that had been forwarded to the Regional Counsel of the Internal Revenue Service.

The portion of the opinion to which the Petitioners directed the Court dealt with the question of which recommendation for prosecution is the operative recommendation under *Donaldson*. This was not an issue in any of the decisions which Petitioners seek to contrast with *Hodge and Zweig*. The opinion in *Hodge and Zweig* not only is consistent with the *Weingarden* and *Wall* opinions, but with the instant opinion from which the Petitioners seek to appeal.

> Appellants charge that the summons in this case was not issued in good faith and that its sole purpose was to aid the unrelated criminal prosecution for narcotics violations. They conclude, therefore, that the district court should have refused to enforce the summons under *Donaldson*. The district court specifically found, however, that "the summons was issued in the ordinary course of an investigation of Sandino to determine his tax liability," and therefore not for the sole purpose of assisting in the criminal investigation. We cannot conclude that this determination was clearly erroneous. (548 F. 2d at 1351)

In further support of their contention that the courts of appeals have made inconsistent findings with respect to the issue at hand, the Petitioners cite the court to *United States* v. *Billingsley*, 469 F. 2d 1208 (C. A. 10). A reading of *Billingsley* discloses that the opinion was in accord with the finding in *Hodge and Zweig* that the operative recommendation referred to in the *Donaldson* opinion is the recommendation by the Internal Revenue Service to the Department of Justice.

Further, the court in *Billingsley*, after citing the *dictum* in *Reisman* indicating that a summons properly may not be used to gather information solely in aid of a criminal prosecution, stated:

> The instant case is not unique and the evidence demonstrates that the Service's investigation of Mills was both civil and criminal in nature. (469 F. 2d at 1210)

It is clear that the alleged confusion of the lower courts with respect to the issue at hand exists only in the minds of the Petitioners. As the court in *Billingsley* stated,

> The Court in Donaldson recognized that the courts of appeals have uniformly approved "the use of a summons in an investigation that is likely to lead to civil liability, as well as to criminal prosecution". (Citations omitted) (*id.* at 1209)

Then the Court in applying this Court's decision in *Donaldson* held:

> The Court then sanctioned the use of a Section 7602 summons in an investigation with both civil and criminal aspects by stating that the *Reisman dictum* referred to the situation "where the sole object of the investigation is to gather data for criminal prosecution *Donaldson* v. *United States, supra,* at 533." (Other citations omitted) 469 F. 2d at 1209.

It would appear that the Petitioners seek to foster that which they ask this court to resolve, *i.e.* "disarray among the circuits." It is apparent, even from the cases cited by the Petitioners, that the circuits uniformly have adhered to the rule that a summons may not be issued solely in aid of a criminal investigation.

e. The Petitioners assert that "[t]he fundamental error of the court of appeals was its assumption that a special agent's investigatory activities are solely for criminal purposes so that his issuance of a summons to obtain evidence of criminal tax violations is a quintessential example of bad faith. (Pet. p. 10)

The court of appeals never assumed that a special agent's investigatory activities are solely for criminal purposes. Rather, the court below reviewed the district court's finding of sole criminal purpose in the issuance of the summons and refused to reverse that finding on the bases not only that it was supported adequately by the record below, but that the court was "not left with a firm and definite conviction that mistake [sic] had been made." (App. B. p. 9a)

The Petitioners then argue that the general organizational divisions within the Internal Revenue Service and various provisions contained in the Internal Revenue Service Manuals establish the joint nature of the investigation herein.

In addition, the Petitioners seek to avoid the specific findings below through their assertion that the duties and responsibilities of special agents generally include certain audit functions.

That these in fact may be among the duties and responsibilities of a special agent does not lead inescapably to the conclusion that every investigation conducted by a special agent is in furtherance of those responsibilities. If the Petitioners' assertions are valid, courts could dispense with any hearing or in-

quiry with respect to these summonses, merely judicially notice these duties and responsibilities, and enforce each and every summons brought before them.

As the court below stated in response to this argument,

> We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him. (App. B p. 15a)

f. The Petitioners then argue that the *dicta* in both *Donaldson* and *Reisman*, when construed together, indicate that, for a summons to be issued solely for criminal purposes, it must be established that it was issued only after a recommendation for prosecution. This argument obfuscates the issue before this Court. Here the district court made a finding of fact that the summonses had been issued solely in aid of a criminal investigation. The logical consequence of the Petitioners' argument is that no matter what the evidentiary posture or testimony may be, a court never may make such a finding of fact unless a recommendation for prosecution has preceded the issuance of the contested summons.

If the Petitioners' arguments are meritorious, the purpose for any adversary hearing or examination of the agent, beyond establishing whether a recommendation for prosecution has been made, is inexplicable.

The Petitioners suggest that the court below gave undue emphasis to one portion of the *Reisman dictum*. It is not the court which emphasizes one phrase of the *Reisman dictum* over another, as asserted, but, rather, the Petitioners, who emphasize the phrase "pending criminal charge" and would ignore in their advocacy the phrase "an investigation solely for criminal purposes" *Donaldson* v. *U. S., supra,* at 533, citing *Reisman* v. *Caplin, supra,* at 449.

Once again it appears that the Petitioners seek to create confusion where none exists. To suggest that a special agent properly may conduct a simultaneous investigation of both the

civil and criminal aspects of any given situation does not avoid the finding below, wherein the court refused to enforce a summons which it found to have been issued solely in aid of a criminal investigation.

g. The Respondents agree with the Petitioners assertion that the decision below threatens to impair the enforcement of summonses issued solely in aid of a criminal investigation. However, the extent to which such a denial may limit the power of Internal Revenue Service not only is acceptable, but constitutionally required. The Internal Revenue Service's interest in enforcing the Internal Revenue laws is not without constitutional and judicial limitation.

The Petitioners interpret the court of appeals' ruling to hold that the subjective motive of an agent may be taken into account in determining whether a summons is issued in good faith. The Respondents contend that such an assertion begs the question before this court. The evidence below established not the motive of the agent, but, rather, the purpose for the issuance of the summons. The courts, and particularly the court below, have not departed from the line of demarcation established in *Donaldson*. Instead the standards as enunciated therein have been followed consistently: "we hold under § 7602 an internal summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." 400 U. S. at 536.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

No. 75 C 3842

THE UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent, Internal Revenue Service,
Petitioners,

v.

LA SALLE NATIONAL BANK, JOSEPH W. LANG, Vice President
of LaSalle National Bank,
Respondents.

MEMORANDUM OPINION AND ORDER

The United States of America and John F. Olivero, Special Agent, Internal Revenue Service, as petitioners, have asked the Court to judicially enforce two Internal Revenue summonses served upon the respondent, La Salle National Bank.

At a hearing on the petition, the evidence established that, at the time of the issuance of the summonses, Special Agent John F. Olivero was assigned to the investigation of possible tax liabilities of one John Gattuso, that his investigation had not been completed, and that he had made neither a preliminary investigative report nor a recommendation for criminal prosecution. Agent Olivero testified that he had not yet determined whether to recommend criminal prosecution in the case.

Respondents contend that Special Agent Olivero was in fact conducting an investigation of criminal violations of the Internal Revenue Code by John Gattuso and that, under these circumstances, utilization of an Internal Revenue summons to obtain evidence was an abuse of this summons. The evidence further revealed that Special Agent Olivero was the only agent assigned to this investigation and that no revenue agent was working in conjunction with him.

The Court recognizes that civil and criminal investigations may go forward side by side before a determination of the ultimate focus of the investigation is made. The Court recognizes further that the presence of a special agent assigned to the investigation does not automatically make it a criminal investigation.

It is an improper use of an Internal Revenue summons to serve it solely for the purpose of obtaining evidence for use in a criminal prosecution. *Reisman* v. *Caplin,* 375 U. S. 440 (1964). On the other hand, it is not an improper use of an Internal Revenue summons to issue it in aid of an investigation, if the issuance is prior to a recommendation for criminal prosecution and in good faith. *Donaldson* v. *United States,* 400 U. S. 517 (1971).

The recommendation for criminal prosecution is certainly the event which definitely determines the focus of the Internal Revenue Service upon criminal prosecution as the end and goal of its investigation. It is apparent, however, that this focus and determination may be arrived at, under certain circumstances, before the actual recommendation for criminal prosecution has been made. In the event such focus and determination has been arrived at at the time of the issuance of the Internal Revenue summons, the fact that it precedes the formal recommendation for criminal prosecution is not relevant. An Internal Revenue summons under such circumstances is not issued in good faith.

The Supreme Court in the *Donaldson* case, *supra,* leaves no doubt that it regards as inappropriate the issuance of an Internal

Revenue summons in an ". . . investigation solely for criminal purposes." *Donaldson* v. *United States,* 400 U. S. 517, at 533.

It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso.

Therefore the petition of The United States of America and John F. Olivero, Special Agent of the Internal Revenue Service, for the enforcement of Internal Revenue summonses served upon the respondent, La Salle National Bank, is denied.

ENTER:

/s/ FRANK J. McGARR,
FRANK J. McGARR,
United States District Judge.

Dated: March 9, 1976

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 76-1572

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent of the Internal Revenue Service,

Petitioners-Appellants,

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of the LaSalle National Bank,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 75-C-3842—FRANK J. MCGARR, *Judge*

Argued January 6, 1977—Decided April 11, 1977

Before PELL and SPRECHER, *Circuit Judges,* and EAST, *Senior District Judge.**

PELL, *Circuit Judge.* This is an appeal from an order of the district court entered on March 9, 1976, denying enforcement

* Senior District Judge William G. East of the United States District Court for the District of Oregon is sitting by designation.

of two IRS summonses served upon the LaSalle National Bank and its vice-president, Joseph W. Lang. The issue presented is whether the district court erred in finding that the two summonses were issued in aid of an investigation solely for criminal purposes and were unenforceable for that reason.

I.

Special Agent John F. Olivero was conducting an investigation of the federal tax liabilities of John Gattuso. On August 15, 1975, petitioner Olivero issued the instant summonses, directing the respondent LaSalle National Bank to appear before him on September 2, 1975, to testify and to produce for examination certain books, records, and papers. Respondent Lang appeared in response to the summonses but failed to testify or produce the records demanded.

On November 11, 1975, the United States and Special Agent Olivero petition the district court for enforcement of the summonses pursuant to 26 U. S. C. §§ 7402(b), 7604(a).[1] The petition prayed, *inter alia,* for an order directing the respondents to show cause why they should not comply with and obey the aforementioned summonses in each and every requirement thereof. The district court issued the order to show cause pursuant to which a hearing was held on December 5, 1975.

1. 26 U. S. C. § 7402(b) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U. S. § 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which said person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

At the hearing, Special Agent Olivero reiterated under repeated questioning that he was attempting to determine whether or not there were any criminal violations of the Internal Revenue Code. He also testified that the purpose of his investigation was "to determine the tax liabilities for the years under investigation." In response to a direct question from the court, Olivero stated that he had not made a determination in his own mind as to whether to recommend criminal prosecution. The agent could not recall specifically reading Section 539 of the Handbook for Special Agents of the Intelligence Division, but admitted in response to another question from the court that he had not kept a chronological work sheet in connection with his investigation of the tax liability of John Gattuso. He could not recall whether he had seen any or all of the documents demanded from the respondent by the summonses.

The respondents called Olivero and Gregory J. Perry as witnesses. Respondents had served a subpoena upon Olivero seeking all files concerning or relating to Gattuso but excused the agent after the district court judge indicated that respondents had not yet sustained the burden of raising a substantial question concerning the validity of the summonses. The judge indicated that he would examine the records in camera if the respondents' presentation of their case suggested that the records should be inspected. Thereupon, the respondents called Perry, who testified that he had asked Olivero at a meeting of June 11, 1975, what civil aspect of the investigation Olivero was getting into. When Olivero said "his investigation was strictly related to criminal violations" of the Internal Revenue Code but would not disclose them, the meeting quickly came to a close. Perry testified that he asked Olivero whether there was any Revenue Agent or officer assigned to the case with him and that Olivero said "no, strictly a criminal investigation."

After hearing testimony, the court stated that it had heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind. The judge indicated that he would undertake the in camera inspection of the materials in the file in view of his understanding that if there was a possibility that information regarding civil tax liability might come up, it was a civil investigation until Olivero closed it. The judge also observed that unless he found something in the camera inspection that gave more support to the Government's position than did Olivero's testimony, it would be the court's conclusion that Olivero was at all times involved in a criminal investigation, at least in Olivero's mind.

After considering the in camera material, the testimony, and various memoranda submitted by the parties, the district court denied enforcement of the summonses. In its Memorandum Opinion and Order, the district court recognized that it was not an improper use of an IRS summons to issue it in aid of an investigation if the issuance was prior to a recommendation for criminal prosecution and in good faith, citing *Donaldson* v. *United States*, 400 U. S. 517 (1971). The court further recognized that civil and criminal investigations might go forward side by side before a determination of the ultimate focus of the investigation was made. Again, the court recognized that the presence of a Special Agent assigned to the investigation did not automatically make it a criminal investigation. After noting that the Supreme Court in *Donaldson, supra*, had left no doubt that it regarded as inappropriate the issuance of an IRS summons solely for criminal purposes, the court stated:

> It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso.

Believing that the district court had either clearly erred in this finding of fact or had acted out of a mistaken view of the law, the United States filed a notice of appeal on May 7, 1976.

II.

The first question in this case concerns our scope of review. Although the district court judge's statement that Olivero was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct was not formally labelled as either a finding of fact or a conclusion of law, we think that it must be regarded as a finding of fact. The district court judge reviewed the testimony of the two witnesses, and his performance of this function must be considered that of a fact finder.

In *United States* v. *National State Bank*, 454 F. 2d 1249, 1252 (7th Cir. 1972), we recognized that the rule of *Donaldson* v. *United States*, 400 U. S. 517, 536 (1971), validated IRS summonses when issued "in good faith and prior to a recommendation for criminal prosecution." There, the district court had granted enforcement. In affirming that judgment, we characterized the essence of the district court's decision as factual findings that the summons there challenged had been "issued in an investigation of civil liability with a possibility of criminal prosecution but with no criminal prosecuton pendng, and was accordingly issued in good faith." *Id.* We determined that "[t]he record justified the [district] court's finding of those facts." *Id.* Thus, this court has ruled that a finding as to good faith is a factual finding the review of which is controlled by the clearly erroneous standard of Rule 52(a), Fed. R. Civ. P.

Technically, *National State Bank, supra,* does not speak to the question of whether a converse determination is exactly analogous. In their main brief, the petitioners contend that a finding of sole criminal purpose is either a mixed finding of fact and conclusion of law or a finding of ultimate fact which involves the application of legal principles. The petitioners cite *United States* v. *Weingarden*, 473 F. 2d 454, 460 (6th Cir. 1973), as authority for the proposition that, in either case, it is reviewable as a matter of law. In their reply brief, the petitioners shift position. Apparently guided in part by the respondents'

vigorous argument that no other reported case holds that a finding such as that made in the instant case is not a finding of fact, the petitioners concede that *United States* v. *Cleveland Trust Company*, 474 F. 2d 1234, 1236 (6th Cir. 1973), *cert. denied sub nom. Miceli* v. *United States*, 414 U. S. 866; and *United States* v. *Zack*, 521 F. 2d 1366, 1369 (9th Cir. 1975), point to an opposite conclusion from that of *Weingarden*. The petitioners now argue that resolution of the question is a false issue in the case, inasmuch as it was quite clear that an improper legal test was applied in making a finding of sole criminal purpose.

We are not persuaded that an improper legal test was applied, and thus we cannot so simply evade the question. We hold that the clearly erroneous standard go' rns review of findings that an IRS summons has or has not issued in good faith. Assuming arguendo that the Supreme Court has not overruled or qualified *Donaldson* in its more recent adjudications, there is ample support in the record for the district court's finding of sole criminal purpose. The record establishes that Olivero testified to the existence of a civil purpose but that the district court, who observed the demeanor of the witnesses, discredited that testimony. We are not left with a firm and definite conviction that mistake has been made.

III.

The second question in this appeal is whether the district court applied the proper legal test in making its finding of fact. The reported cases establish that the various circuits, including our own, have formulated several distinct standards for quashing a summons issued under 26 U. S. C. § 7602.

The major problem in determining the proper legal test arises from the language of the *Donaldson* opinion. In the thirty-fourth paragraph of the decision, 400 U. S. at 533, the Supreme Court stated that the dictum of *Reisman* v. *Caplin*, 375 U. S.

440 (1964)[2], comes into proper focus as applicable "to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes." However, the *Donaldson* opinion used different language in the thirty-eighth and last paragraph, 400 U. S. at 536, where it stated:

> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Subsequent to *Donaldson*, the courts of appeals have devoted considerable intellectual energy to the analysis of its language. Usually, the Government has argued that the single standard for determining the validity of an IRS summons is the recommendation for prosecution" standard. Although some cases have appeared to accept that position, *e.g.*, *National State Bank*, *supra* at 1252, the more recent decisions have highlighted the role of *Donaldson's* "good faith" language.

In *Weingarden*, *supra*, the Sixth Circuit noted that the formulation of the standard which authoring Justice Blackmun prefaced with the words "We hold" was technically dictum. 473 F. 2d at 460. *Accord*, *United States* v. *McCarthy*, 514 F. 2d 368, 374 n. 7 (3d Cir. 1975); *United States* v. *Lafko*, 520 F. 2d 622, 625 n. 5 (3d Cir. 1975). *See also United States* v. *Friedman*, 532 F. 2d 928, 932 (3d Cir. 1976). Thus, the *Weingarden* court relied instead on the *Donaldson* paragraph relating to the *Reisman* dictum, ruling that "[t]he standard is whether the sole purpose of the issuance of the summons is for criminal prosecution." 473 F. 2d at 460.

2. The *Donaldson* opinion, 400 U. S. at 532, identified the following passage from *Reisman*, supra at 449, as dictum, referring to it thereafter as "the *Reisman* dictum":

> [T]he witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker*, 239 F. 2d 767, 772-773, as well as that it is protected by the attorney-client privilege.

In *United States* v. *Wall Corporation*, 475 F. 2d 893, 895 (D. C. Cir. 1972), the court, after setting forth the *Donaldson* paragraph dealing with the Supreme Court's "holding," stated that inquiry was not ended upon a determination that prosecution had neither been instigated nor recommended. The rationale for probing beyond mere "recommendation for prosecution" was that *Donaldson* also required that a summons be issued in "good faith." The *Wall* court stated that if it could be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution, even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. 475 F. 2d at 895.

In *McCarthy*, *supra* at 373-75, the Third Circuit reviewed the precedents applicable to the "criminal purpose defense" recognized in *Reisman*, *supra*, and the "good faith" defense discussed in *Wall*, *supra*.[3] As to the first, it observed that the defendants had not alleged that a recommendation for criminal prosecution had been made prior to the issuance of the summons. Accordingly, it ruled that the defendants' allegations were insufficient to bring the matter on unenforceability on the grounds of criminal purpose into controversy. 514 F. 2d at 374. As to the latter, it determined that the defendants' allegations sufficiently raised the possibility that the IRS agents had no intention of pursuing any civil remedies as to bring into question their good faith. *Id.* at 375. Accordingly, it held that the district court should conduct a hearing concerning the issues raised by the allegations of the absence of civil purpose.

More recently, the Third Circuit has apparently retreated from an effort to approach *Donaldson* through an analysis

3. *McCarthy* declined to follow *Weingarden*, *supra*, which it read as holding that *Donaldson* could be read as promoting the "solely for criminal purposes" test and not the "recommendation for prosecution" test. At the same time, however, *McCarthy* stated that the portion of the *Donaldson* opinion found in the last paragraph of Justice Blackmun's opinion for the court was, technically speaking, mere dictum. *See* 514 F. 2d at 374 n. 7.

distinguishing its holding from its supposed dictum. In *Friedman, supra,* 532 F. 2d at 932, the court stated that the standards for judicial enforcement of a § 7602 summons were found in *Donaldson,* and explained in *McCarthy, supra,* and even more recently, in *Lafko, supra.* The *Friedman* opinion explains that these cases recognize that the IRS has no authority to conduct a criminal investigation through the use of a § 7602 civil summons, noting that no court has given a thorough or persuasive justification for this construction. 532 F. 2d at 932 n. 9. The *Friedman* case recognizes that *Donaldson* and the Third Circuit cases hold that the mere fact that criminal as well as civil liability may result will not prevent judicial enforcement if (1) the Intelligence Division has not yet recommended prosecution, (2) the agent has not already formed a firm purpose to recommend prosecution, (3) the summons is not being used to harass the taxpayer, and (4) the material referred to in the summons has not already been inspected by the Government. *Id.* at 932.

The *Friedman* formulation of a four-prong basis for denying enforcement of an IRS summons represents a careful articulation of the principles gleaned from the many cases considering the validity of particular summonses. As an a *priori* approach, its analysis has much to recommend it. However, we can hardly fail to note that the *Friedman* analysis sedulously avoids any use of the phrase "in good faith," substituting instead a reformulation which sets forth the circumstances under which denial of enforcement is proper. Instead of attempting exegesis of the language of *Donaldson,* the *Friedman* case traces the contours of precedent back to the original formulation of a rationale by Judge Wyzanski in *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass. 1953).

The Ninth Circuit has taken a different approach. In *United States* v. *Zack, supra,* 521 F. 2d 1366, the court reviewed a district court order denying enforcement of an IRS summons. The lower court had conducted a hearing and made a finding of fact that the investigation's sole purpose was to establish criminal

liability. Upon the Government's appeal, the court followed *Weingarden's* ruling, 473 F. 2d at 460, that an IRS summons, if issued solely for criminal purposes is not issued in good faith, even though there has been no recommendation for prosecution. Thus, *Zack* determined that indictment or recommendation of criminal prosecution was not a prerequisite to a finding that an investigation is solely criminal. 521 F. 2d at 1368.

Significantly, *Zack* again found it necessary to reconcile the various passages in the *Donaldson* opinion. After directing attention to that portion of the opinion discussing the *Reisman* dictum, *see* 400 U. S. at 533, *Zack* turned to the last, "holding" paragraph. It concluded that even prior to a recommendation for criminal prosecution, an administrative summons should not be enforced unless it is issued in good faith. The court explained, *supra* at 1368:

> We harmonize this "good faith" requirement with the language disapproving the use of the summons in "an investigation solely for criminal purposes" by concluding that the government would not be in good faith if it uses an administrative summons solely for criminal prosecution purposes. Thus, in this case, if the administrative summons was used solely for criminal purposes, it is not issued in good faith and is impermissible. This is true even though there has been no recommendation for prosecution.

In carrying out its hermeneutical task, the *Zack* court took no position on the characterization of the concluding *Donaldson* paragraph as holding or dictum.

A review of the cases from other circuits establishes to our satisfaction that the *Donaldson* opinion has engendered some confusion. Accordingly, we shall take at face value the words of the authoring Justice and characterize the final paragraph of the opinion for the court as constituting a holding of *Donaldson.*[4]

4. The courts have characterized the final paragraph as mere dictum because the Supreme Court did not have to rule on the sufficiency of the taxpayer's claims, one of which was the criminal purposes defense. *See, e.g., McCarthy, supra,* 514 F. 2d at 374 n. 7.

(Footnote continued on next page)

Thus, it is proper for a district court to grant enforcement of an IRS summons if it is issued in good faith and prior to a recommendation for criminal prosecution. Conversely, if a summons is issued in bad faith or after a recommendation for prosecution, enforcement must be denied[5].

We agree with the respondents that the petitioners' arguments ignore the good faith requirement of *Donaldson*. We further agree that the real issue before the court is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunicated in *Donaldson*. Because we are persuaded that *Zack's* reconciliation of the various *Donaldson* paragraphs accurately delineates what the Supreme Court has held, we must reject the petitioners' arguments.

The Government insists that there was no evidence that Special Agent Olivero was not simultaneously pursuing a civil investigation. Reading the record evidence in this fashion, the petitioners submit that it is clear that the special agent's investigation encompassed the purpose of determining the taxpayer's tax liability. Suggesting that the district court misfocused its inquiry, the petitioners insist that the only relevant inquiry is whether the investigation in aid of which the summons is issued is directed at least in part toward determining the liability of some person

(Footnote continued from preceding page.)
However, the Supreme Court was perfectly aware that its holding that the taxpayer's interest was not of sufficient magnitude to support intervention effectively disposed of the case. In *Donaldson, supra* at 531, the authorizing Justice states, prior to Part VII's resolution of Donaldson's arguments, that "[t]his conclusion [*i.e.*, insufficient interest to support intervention] could dispose of the case, for our *main concern* here is with the taxpayer's asserted right to intervention in the particular enforcement proceedings." (Emphasis supplied.) That the Court went on to examine its *Reisman* dictum appears to us an intentional formulation of an alternative holding.

5. Although our prior cases of *United States* v. *Turner*, 480 F. 2d 272 (7th Cir. 1973); and *United States* v. *Awerkamp*, 497 F. 2d 832 (7th Cir. 1974), use different phraseology, they are consistent with this interpretation of *Donaldson*.

for an internal revenue tax.[6] The Government argues that once it is demonstrated that there is nothing unusual or sinister about the special agent focusing his attention on the criminal aspects of the case, the finding of sole criminal purpose must fall.

We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him.

We note that the district court expressly observed the *bona fides* of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson, see* 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding.

We have examined subsequent Supreme Court decisions, such as *Couch* v. *United States*, 409 U. S. 322 (1973); *Beckwith* v. *United States*, 425 U. S. 341 (1976); and *Fisher* v. *United States*, 425 U. S. 391 (1976). Although those cases establish that a taxpayer is clearly the "focus" of a criminal investigation when the matter is assigned to the Intelligence Division of the Internal Revenue Service, they do not reflect in our reading of them any intent of the Supreme Court to qualify or cut back its holding in *Donaldson, supra* at 536. Accordingly, the "bad faith" test spelled out by that decision is controlling law.

We note that the district court formulated its factual finding by use of the expression "sole criminal purpose" rather than by

6. In their main brief, the petitioners state that "[i]t is the government's position that a summons may be used solely for the purpose of criminal investigation at any time prior to the final recommendation for criminal prosecution." They found it unnecessary to advance the argument because of their view that the evidence in this case clearly established that the special agent's investigation encompassed a civil aspect.

a label such as "bad faith." We find no basis for reversible error in that verbal formulation. The district court grasped the vital core of *Donaldson* and rendered its factual finding consistently therewith. Accordingly, its order denying enforcement of the two IRS summonses is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Opinion by Judge Pell

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 76-1572

April 11, 1977

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON WILLIAM G. EAST, *Senior District Judge**

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent of the Internal Revenue Service,

Petitioners-Appellants,

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of the LaSalle National Bank,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75-C-3842

FRANK J. MCGARR, *Judge*

* Honorable William G. East, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.